BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The judgment of the District Court is found at pages 75-76 of the record, and the opinion and judgment of the Circuit Court of Appeals, not yet published, is found on page 87 of the record.

Statement of the Case.

This has already been stated in the preceding petition, which is hereby adopted and made a part of this brief.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act does not permit to be supplied by implication or construction omission of any employment contract to provide expressly a "regular rate" of wage for straight time hours, and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively, but in all such cases requires the regular rate to be determined by dividing the total weekly compensation by the total weekly hours worked, and to be applied to the maximum lawful straight time hours, with one and one-half times such rate applied to all hours in excess thereof.

2. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act does not permit to be supplied by implication or construction such an omission in an express employment contract, which the court found to have provided expressly a fixed and definite salary for a fixed and invariable number of weekly work hours (which includes statutory straight time and overtime

hours), in the making and performance of which by employer and employee the court found that *(1)* both parties intended such agreed salary to be compensation in full for all such agreed work hours, *(2)* neither of the parties intended to violate the law, and *(3)* both of the parties, though believing that the employment was not subject to the Fair Labor Standards Act, in good faith believed that if subject to the Act, the contract, employment and payments complied with the Act, and so considered and treated the matter for nearly two years; and in effect that, under such circumstances, a method or formula is fictional and inapplicable, which is based upon the presumption or implication that the parties in their contract intended as straight time weekly work hours the only number which would be lawful in the absence of an expressly agreed smaller number of such hours, namely, the maximum statutory straight time weekly work hours; and that the regular rate must be determined by dividing the total weekly compensation by the total weekly hours worked, that such regular rate must be applied to such maximum statutory straight time weekly work hours, as the applicable number of straight time weekly work hours, and that one and one-half times such regular rate must be applied to all hours in excess thereof.

3. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act is violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation, by failure of the employer to pay overtime compensation in regular course of employment (presumably, on or before the regular pay day, a semi-monthly pay day in this case), and that the statute permits no excuse or relief from either the accrual or enforcement of such liability.

4. The Circuit Court of Appeals erred in holding and deciding that the decision of this Court in the case of *Carter*

v. *Carter Coal Company,* 298 U. S. 238, construing the commerce clause of the Constitution of the United States, and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and holding that under the Constitution the Congress is without power to regulate the bituminous coal industry, and wages and hours in that industry, does not have *stare decisis* effect upon the statutory liability for liquidated damages under the Fair Labor Standards Act.

ARGUMENT.

Proposition I.

(Specification of Error No. 1.)

When there are present in an express employment contract and the facts and circumstances incident thereto the necessary elements from which unexpressed contractual elements may be implied under the law of contracts in order to make the contract lawful, operative, definite, reasonable and capable of being carried into effect, without violating the intention of the parties, the Fair Labor Standards Act does not prevent or preclude but permits and requires such implication and construction, and in such cases the formula approved and adopted by the court below is inapplicable and artificial when it violates the intention of the parties and destroys the expressed terms of the contract.

In support of its said holding and decision contrary to this proposition, and its statement that the law is now so settled beyond dispute, the Circuit Court of Appeals cited the following decisions:

Overnight Motor Transportation Co. v. *Missel,* 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. ed. 1682;

Patsy Oil & Gas Co. v. *Roberts,* 132 F. (2d) 826;

Warren-Bradshaw Drilling Co. v. *Hall,* 124 F. (2d) 42, aff. 317 U. S. 88, 87 L. ed. 99 (Adv. Sheet);

Mid-Continent Pipe Line Co. v. *Hargrave,* 129 F. (2d) 655;
Walling v. *Stone,* 131 F. (2d) 461;
St. John v. *Brown,* 38 F. Supp. 385.

Petitioner respectfully submits that neither of the above decisions from this Court had the effect so attributed to them, and that the decision of this Court in *Overnight Motor Transportation Co.* v. *Missel, supra,* below referred to as the *Missel* case, was very definitely to the contrary, while the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall,* below referred to as the *Warren-Bradshaw* case, involved no such general proposition of law, but only implication from the facts in that case, and imported that implication arises in a proper case.

In the *Missel* case was involved contract for a weekly wage for variable or fluctuating work hours under the Fair Labor Standards Act. This Court announced rule and formula applicable thereto, and distinguished that case from the case of *L. Metcalf Walling, etc.,* v. *A. H. Belo Corp.,* 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. ed. 1716, below referred to as the *Belo* case, and in so doing stated the rule and formula (used by the lower courts in this case) applicable to contract for fixed weekly wage for regular contract hours which are the actual hours worked, in cases where the contract does not provide, as did the contract in the *Belo* case, a regular rate of wage for straight time hours and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively. As we understand each such holding, in it this Court dealt with the actual contract, and not with the question of implication of the allocation in the contract.

However, there was part of the opinion in the *Missel* case devoted by this Court to such question of implication.

In the *Missel* case, petitioner contended for implication, and in disposing of that contention this Court said:

> "Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional, for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

The holding of the Circuit Court of Appeals in the present case seems to us to be in conflict with what appears to be the clear purport of the last above quoted language of this Court. This Court did not say in the *Missel* case that the presumption and construction there contended for would not be indulged in any case. The Court pointed out the absence of a contractual element necessary to justify and support the implication and construction contended for, namely, that there was no limit upon the hours of work petitioner in that case could have required for the agreed wage, under the contract; and held that this deficiency in its terms precluded mending the contract by implication. It is manifest that the clear purport of the said language of this Court is, that, although such process of mending by implication, well known to the law of contracts, could not be used in that case for the reasons stated, absent such deficiencies, implication will lie in an employment contract under the Fair Labor Standards Act, as in any and all other contracts.

In the *Warren-Bradshaw* case, this Court said that it was concerned in the application of the Fair Labor Standards Act "to a particular situation." In the last paragraph of the opinion, this Court refused petitioner's contention that it complied with the overtime compensation requirements of the Act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. The same paragraph of the opinion stated that respondents were employed on the basis of an eight-hour day and regularly worked seven days a week, receiving fixed wages and that there was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. The opinion did not give this Court's reason for rejection of the implication, otherwise than to say that the argument was similar to arguments squarely rejected in the *Missel* case.

That, in the *Warren-Bradshaw* case, this Court was dealing with the same contractual deficiencies as in the *Missel* case, is evidenced by the following quotation from the brief accompanying the petition for writ of *certiorari* (page 13) in the *Warren-Bradshaw* case, to-wit:

> "In so far as there was evidence as to how the respondents went to work, it appears that they merely joined themselves to a rotary drilling crew without any express agreement as to wages. Each of them had in his mind that he would work eight hours each day, seven days per week, until the rotary drilling on that well was finished, and he expected to be paid a certain amount for his labor on the well (R. 58). He was paid for his work in accordance with that expectation, and the payment he received was in each instance more than sufficient to provide for a basic wage scale and time and a half for overtime as provided by the Fair Labor Standards Act."

Thus, in the *Warren-Bradshaw* case it appears that this Court was called upon to imply, not merely the intention of the parties in an express contract, but to imply the entire contract, when as a matter of fact the employee did not have a contract, either express or implied, for even one week's work, or for a time long enought to accumulate statutory overtime, but worked by the day for a daily wage, and no intent or fact was found from which it could possibly be inferred that the compensation was intended by the parties to cover overtime hours of work.

The case of *Mid-Continent Pipe Line Co.* v. *Hargrave, supra,* involved employees who were employed to work at a daily wage. It presents the same basic deficiencies that are present in the *Warren-Bradshaw* case and is ruled by the same principle.

In the case of *Walling* v. *Stone, supra,* the contract was for a fixed weekly salary regardless of the number of hours worked in a week. The deficiencies in that case, therefore, are the same as in the *Missel* case with the same result.

In the case of *St. John* v. *Brown, supra,* there was no showing or finding as in the instant case that the parties intended and agreed that the agreed compensation was in full payment for the agreed work. The employer there contended that if the agreed compensation was susceptible of allocation so as to meet the minimum wage requirements of the Act it complied with the Act. Petitioner has made no such contention in this case. Mere susceptibility of such an allocation standing alone is not sufficient to warrant or support the implication. However, when such an allocation is rooted in the agreement and intention of the parties, as in this case, and is necessary to the effectuation of that intent and to the preservation and effectuation of the expressed terms of the agreement an entirely different case is presented and one in which such allocation can and should be implied.

In *Patsy Oil & Gas Co.* v. *Roberts, supra,* the implication upon which appellant relied, and which was not sustained by the court, was based upon a premise which had no foundation in the facts of the case and which was actually contrary thereto. When limited to the facts of that particular case the opinion and holding of the Circuit Court of Appeals may be understandable. However, the language used is susceptible of the interpretation that the court held or intended to hold that the regular rate of pay and the allocation of the agreed work time into straight time and overtime and the allocation of agreed compensation into straight time pay and overtime pay must be expressed in words by the parties and if not so expressed cannot be implied under any circumstances so as to give effect to the intention of the parties and the terms of the contract upon which express agreement has been had. That it intended to and did so hold and decide in that case may be indicated by the court's citation of its opinion in that case as authority for its holding in this case. We respectfully submit that if such was the holding in the *Patsy* case, it constitutes and is error similar to that of which we complain in this case.

Under our presentation of the immediately succeeding proposition, we present the situation in this case, as illustrative of a case in which the necessary contractual elements are present, from which unexpressed contractual elements may be implied under the law of contracts.

We respectfully submit that it being clear from the decisions of this Court in the *Missel, Belo* and *Warren-Bradshaw* cases that contracts between employer and employee are recognized by the Fair Labor Standards Act, the fact that a Circuit Court of Appeals in effect has construed the decisions of this Court to mean that that Act emasculates the law of contracts as applied to employment, by stripping it of implication, the life-giving element of every contract,

treats employment contracts as though they existed in a vacuum apart from the general body of the law, and contrary to universal law sacrifices substance on the altar of form, renders it important that that question be settled by this Court.

There is inherent the practical question of transcendant importance, whether the security of industry and labor shall require that in each of the multitudinous millions of employment contracts, large and small, of the immediate and far future, there must be express contract, even in writing, because of the absence of implication necessary to be so carefully made as to require the services of skillful attorneys; or whether under the Fair Labor Standards Act, as does citizenship under other statutes, industry and labor may live and succeed together in the fold of familiar, traditional legal principles and methods of contracting.

Proposition II.

(Specification of Error No. 2.)

Under the facts found in this case, the Fair Labor Standards Act permits and requires to be supplied by implication or construction, the contractual elements found by the court not to have been expressed in the express employment contract, in accordance with the law of contracts and particularly the provisions of Sections 15-159 and 15-172, Oklahoma Statutes 1941; and, in view of the definiteness and invariableness of the agreed compensation and the agreed work hours, and the intent of the parties that the salary compensate respondent in full for all hours worked, without violating the law, and with intent to conform to the Fair Labor Standards Act if subject thereto, and the mutual satisfaction of the parties with such arrangement for nearly two years, it is permissible, and not fictitious, to presume that the parties intended the only thing that would accomplish all such intent, namely, that the statutory maximum straight time weekly work hours are the applicable straight time weekly work hours, under

which presumption the intended full compensation and legality result mathematically.

The findings of facts and intent, referred to in the above proposition are set forth with record references in the statement in our petition for *certiorari,* and will not be repeated here.

There is neither the total absence of contract, nor the absence of contract for fixed wage for fixed hours for fixed period (sufficient to accumulate overtime), as in the *Warren-Bradshaw* case, or elements absent in other cases cited by the Circuit Court of Appeals, as hereinabove noted.

There are not absent, but are present, the elements indicated in our quotation from the *Missel* case under Proposition No. 1 as essential to implication, and more. There is contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage. There is also definite finding (Finding 14, R. 68) that the express employment contract did not require plaintiff to work for the agreed salary in excess of the agreed hours or days. In addition to these elements mentioned in the *Missel* quotation, there are express findings, conclusive on appeal and in this proceeding (Finding 25, R. 72), that both parties believed in good faith that the employment was not subject to the Fair Labor Standards Act and that if it was subject to the Act, the contract, employment and payments complied with the Act (and therefore, necessarily, acted with reference to the Act); that (Finding 15, R. 68) in making and performing the employment contract, neither petitioner nor respondent intended to violate the law (necessarily thus having reference to the Fair Labor Standards Act, as above stated); that (so intending), (Finding 13, R. 68) in making and performing the express employment contract, both parties intended that the said monthly salary compensate respondent in full for all time worked by him to the extent of

the agreed hours per day; and, with this express contract, and these elements of intent in mind, the findings and the entire case disclose that both parties were satisfied with the arrangement over a period of nearly two years.

Section 7, Fair Labor Standards Act, provides that no employer shall * * * employ any of his employees * * * for a work week longer than the specified maximum statutory straight time hours, unless such employee receives compensation for his employment " in excess of the hours above specified" at a rate of not less than one and one-half times the regular rate at which he is employed.

It is in effect expressly and conclusively found that in making and performing the employment contract, the parties did not intend to violate that provision, and thought that they were complying with it if it were applicable. They did not expressly agree to a regular rate or number of straight time hours, but are conclusively found in effect to have intended that which would be legal and comply with the statute, and apply the salary as full compensation for the agreed hours of work, and thereby effectuate their intention and the express terms of the contract. They therefore conclusively agreed that the salary was intended to pay for legal straight time hours, which were the statutory maximum straight time hours (44 hours the first year, 42 hours the second year, 40 hours the third year) at such rate of wage (determinable by mathematics) as would pay therefor and leave just exactly sufficient of the salary to equal and pay for the overtime hours at one and one-half times such rate. If they are presumed not to have intended the maximum straight time weekly work hours as the straight time weekly work hours, then they intended to violate the statute, but the findings are that they did not intend to violate the statute, and therefore necessarily that they intended the salary to be applied accordingly, if the Act were applicable.

We are unable to conceive how there could be more definiteness, even by expression in words. Given the express contractual elements and the intentions of the parties in this case, the allocation of the compensation in conformity therewith and with the law is a simple and infallible mathematical process. It is necessary only to presume that the straight time hours are the maximum legal straight time hours under the Act. All other elements necessary and incident to such allocation are found in the express contract and intention of the parties and in the express terms of the law, and the aforesaid presumption necessarily inheres therein.

Indeed it is that very same presumption or implication that is used as a basis for the formula or method of allocation approved by the courts below. Having indulged that presumption, the method or formula approved below departs from the expressed terms and intentions of the parties and resorting to fiction as a substitute therefor reaches a result which is contrary to such expressed terms, violative of the intention of the parties, and destructive of the contract.

The method of allocation or formula (footnote 2, opinion below, R. 84), which petitioner contends inheres in the contract and intentions of the parties, and effectuates the same in conformity with the law, is as follows:

Y = Hourly rate for statutory straight time.
1½Y = Hourly rate for statutory overtime.
84 = Total weekly hours worked each week first year (the agreed hours).
44 = Weekly hours statutory straight time.
84 — 44 = 40 = Weekly hours statutory overtime.
44 × Y = 44Y = Pay for statutory straight time.
1½ Y × 40 (statutory overtime) = 60Y = Pay for statutory overtime.

$$
\begin{aligned}
44\ Y + 60Y &= \$39.43 \\
104Y &= 39.43 \\
Y &= .3791 \text{ hourly rate 44 hours statutory weekly straight time.} \\
1\tfrac{1}{2}Y &= .5686 \text{ hourly rate statutory overtime.}
\end{aligned}
$$

With all due respect to the Circuit Court of Appeals, that court evidently overlooks the fact that the above formula was neither urged nor rejected in *Patsy Oil & Gas Co.* v. *Roberts,* 132 F. (2d) 826 (10 C. C. A.), as stated in footnote 2, page 6 (R. 84), opinion of the Circuit Court of Appeals in this case. The same formula was not used at all in the *Patsy* case. In that case the employer asked the court to imply an agreement for a longer number of hours than the agreed or worked hours as the basis for the formula contended for in that case, which, of course, could not be done. We are asking the Court to enforce expressly found contractual terms and intent, which applies the salary to the only number of hours possible to such intent, as straight time hours, namely the legal or statutory maximum straight time hours.

In addition to the foregoing, and in addition to the well known principles of contractual interpretation, too well known to require citation of authority here, we urged upon the trial court and the Circuit Court of Appeals, and here present, Sections 15-159 and 15-172, Oklahoma Statutes 1941.

The trial court found (Finding 17, R. 69) that the employment contract was made, and was intended to be performed, and was performed, in the State of Oklahoma. 28 U. S. C. 725* makes the state laws of Oklahoma rule of decision under such circumstances.

*Quoted in the Appendix.

Section 15-159, Oklahoma Statutes 1941, being Section 953, Revised Laws 1910, is as follows:

> "*Interpretation Favors Validity.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 15-172, Oklahoma Statutes 1941, being Section 966, Revised Laws 1910, reads as follows:

> "*Necessary Incidents Implied, When.* All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

These statutes were parts of the employment contract. In addition to these Oklahoma statutes, the general law is that where a contract is fairly susceptible of two constructions, one of which will render it lawful, and other unlawful, the former will be adopted. *Fairbanks, Morse & Co.* v. *City of Wagoner, Oklahoma,* (C. C. A. 10) 81 F. (2d) 209 (218); *Great Northern Railway Co.* v. *Delmar Co.,* 283 U. S. 686, 691, 51 S. Ct. 579, 75 L. ed. 1349.

The decisions of the trial court and the Circuit Court of Appeals denied consideration to both the above general principles and the Oklahoma Statutes, apparently on the theory that this Court had held against implication and that the Fair Labor Standards Act does not permit implication.

If the writ of *certiorari* is granted, we shall wish to brief the matter more fully; but assume that the foregoing is sufficient to present to this Court our petition for the writ, based on the contention that the lower courts erred in refusing implication under the facts in this case.

We respectfully submit that, in addition to it being of

prime importance that this Court settle the question of implication generally under the Fair Labor Standards Act, it is likewise important that this Court determine and settle the same in this case, for the reason that it presents with unusual clarity and directness, these and other herein presented important questions of federal law, decision of which by this Court is necessary to clarify the law and of vital public concern.

PROPOSITION III.

(Specification of Error No. 3.)

The Fair Labor Standards Act is not necessarily violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation earned during a pay period, by failure of the employer on or before the regular pay day, or at any particular time, to pay overtime compensation earned during a pay period; and under the facts found by the lower courts, was not violated in this case with respect to the overtime compensation paid.

This proposition will only be applicable if the Court denies our Propositions I and II, and in that event will be applicable to the part of the judgment of the trial court for liquidated damages in an amount equal to overtime compensation calculated and actually paid by petitioner, voluntarily on petitioner's own initiative, prior to demand or suit, and prior to any question being raised, in the effort to make sure that, in a doubtful situation, it was not violating the statute; and will not be applicable to that part of the judgment composed of $19.89 representing overtime for half hour lunch periods, which the court held were erroneously deducted by petitioner in its said settlements, and $19.89 liquidated damages, in an equal amount.

The Fair Labor Standards Act does not provide when the employee shall receive the overtime compensation. Sec-

tions 7(a) and 16(b) (the latter the liquidated damage section)*, same Act, construed together, do not provide a time within which, if overtime compensation is not so received, the statute is violated and liquidated damage liability arises. We anticipate that if petitioner is held to have contracted for overtime compensation, our first two propositions will be sustained, and this proposition will not be applicable. If petitioner be held not to have contracted for overtime compensation, then likewise there would be no *contractual* period within which the overtime compensation was required to be paid, before liquidated damage liability would arise.

This proposition does not raise the question either that *(a)* violation of the Act does not give rise to liquidated damages, or *(b)* that liquidated damages is not mandatory, but recognizes that those questions have been settled in the affirmative; nor does it present a contention, as the opinion of the Circuit Court of Appeals imports, that good faith violation of the statute can be excused. Petitioner at all times has contended that the statute was not violated.

This proposition raises the question as to whether the provisions of the Fair Labor Standards Act, and particularly of the liquidated damage provision in Section 16, are rigid, and force themselves inevitably on the contracting parties to employment, so that the statute is automatically violated by failure of the employer to pay, and the employee to receive, overtime compensation, or even any part of his compensation, on agreed or customary pay days, or at or during any other particular time, without regard to the agreement or acts of the parties. We contend in the negative.

This proposition also raises the incidental, but possibly determinative, questions as to whether the Fair Labor

*Quoted in the Appendix.

Standards Act permits the parties to an employment contract, in the absence of bad faith, by their own act, by agreement, or by other act or omission under general principles of law and equity held to amount to agreement, to defer the time of payment of overtime compensation, so that the act is not violated by failure to pay it or receive it during such period of deferment, so as to give rise to liquidated damages. It also involves the subordinate contention that liquidated damage, being damage, does not arise until its component elements of injury, etc., arise. We submit that the Congress in the Fair Labor Standards Act intended new statutory rights and obligations subject to, and within the sphere of operation of, legal and equitable principles embedded in our system of government.

The principle of automatic violation on failure to pay before a time certain, would make the Act rigid, arbitrary, despotic, and harmful. It seems safe to assume that the Congress did not intend that consummation, and deliberately provided against it by omitting to fix time certain when such payment must be made in order to avoid violating the statute.

The Congress was conversant with, and this Court knows without citation of authority, the principle that when statute or contract does not provide time, reasonable time is intended, that is, a time that is reasonable under all the circumstances of the particular case, which would take into consideration acts of commission, omission and stipulation by the parties. Such construction will accomplish all the purposes of the Act.

Statutes and contracts, as to their provisions for time, are construed somewhat in the same manner. This Court has even said:

> "When no specific time for the payment of money is fixed in a contract by which the same is to be paid by

one party to the other, in judgment of law, the same is payable on demand."

—*The President, Directors and Company of the Bank of Columbia* v. *Peter Hagner,* 1 Pet. 455, 7 L. ed. 219.

The test set up by Congress in the Fair Labor Standards Act is the payment of the overtime compensation and not the time of payment. Congress deliberately omitted the test of time, evidently to avoid rigidity, arbitrariness and despotism by applying a fixed and invariable rule to all cases. There is apparent the intention that each case should depend upon its circumstances and the agreements of the parties, within the fair purpose and intent of the legislation.

We shall not repeat our statements of the findings of the court as to reasons for delay of payment in this case, except briefly to say that the findings were that the delay in payment was due to the belief of both parties in good faith that the employment of respondent was not subject to the Fair Labor Standards Act, and their belief in good faith that, if it were subject to the Act, the contract, employment and payments complied with the Act, and that no question arose beween the parties for more than two years, and until after petitioner, in view of uncertainty in court decisions, voluntarily and without suggestion or demand by respondent, computed in manner held by the trial court to have been proper, and paid respondent all the overtime compensation that would have been due him if the employment were subject to the Act and the contract not in compliance with the Act (except a very small amount attributable to half hour lunch periods erroneously deducted), all during a time when the questions involved were the subject of great confusion of opinion among the citizenship, the bar and the courts of the nation, and without the intent of either party to violate the law, the petitioner relying upon legal

counsel and the decision of this Court in the case of *Carter* v. *Carter Coal Company*, 298 U. S. 238.

It was not just simply a case of mistake of law, as said by the Circuit Court of Appeals, for the findings included findings that both parties believed in good faith that if the employment were subject to the Fair Labor Standards Act, the contract, employment and payments complied with that Act, and that no overtime compensation was owing.

The effect of the holding of the lower courts would seem to be that Congress, in providing that no employer shall employ an employee for a work week longer than the specified maximum straight time hours, unless the employee receives time and one-half payment for the overtime, and that any employer who violates such provision shall be liable to the employee affected for liquidated damages in an additional amount equal to the unpaid overtime compensation, wrote between the lines the further provisions

> *even though neither employer nor employee knows that the employer is so doing, and believe in good faith that he is not so doing,*

or

> *regardless of the mutual intent and understanding of the parties,*

and

> *this provision shall be deemed violated if the overtime compensation is not paid on or before the regular pay day, which payment cannot be extended or deferred by any act or agreement of the parties regardless of their good faith or other circumstances*

and

> *The courts shall have the powers only of administrative bodies in the enforcement of this Act and the liquidated damages provided by it.*

Although this court has held that the liquidated damage is not a penalty, it has not been held that it is not in the na-

ture of a penalty. It is designed to inhibit and impel action. Section 16 of the Act allows it to the employee or employees "affected in the amount of * * * their unpaid overtime compensation," in an additional equal amount. The amount is rigid, but, as "damage," involves and is legislative measure of injury. The words "affected" and "unpaid" and "equal" require construction. This section, Section 16, omits time except, to say that one who violates Section 6 or Section 7 "shall" be liable. Counsel conceive that these expressions should be construed in the light of the above suggestions as to construction of Section 7. Congress evidently intended legislative duress against industrial duress, by compensation of an employee "affected" by industrial duress, and neither compensation nor punishment for mutual mistake or good faith, act or agreement, in which not even the imagination can conceive industrial duress or an employee being "affected" in an amount "equal" to his "unpaid" overtime compensation.

That the lower courts in this case did not pass upon the reasonableness of the time within which the overtime compensation was paid, is evidenced by their holding to the mandatory and arbitrary nature of the question of statutory violation and liquidated damages, and is indicated by the following quotation from the opinion of the Circuit Court of Appeals:

> "If any amount of good faith will excuse the payment of liquidated damages imposed by Section 16(b), it would seem wholly justified by the unchallenged factual findings of the trial court, but here the overtime compensation was not paid when due in the regular course of employment, because the parties did not believe it was owing. The violation was committed in good faith based upon a mistake of law."

We should not lose sight of the fact that in the above quoted holding the court overlooked the finding that the

parties believed in good faith that the contract, employment and payments complied with the Act.

While there was no express agreement for deferment of the overtime compensation, if due, the pay days were semi-monthly, and pay day after pay day for nearly two years one party paid and the other accepted the salary, with the good faith belief that they were complying with the Act, each such act establishing the intent of the parties in each similar act back to the beginning. If they had made written or spoken agreement to allocate the salary to time and overtime separately, in accordance with the intent thus shown, the lower courts would have concurred in their said ultimate intent. Their oft and long repeated acts wrote that intent, as well as assent to deferment of the overtime compensation, in particular circumstances which in other types of cases the courts would hold to amount to agreement, in good faith and without duress. If this would be true upon no other grounds, it would result from the principle of estoppel, pleaded and presented by petitioner in the lower courts.

In addition to our contention that the statute was not violated, it seems to us that Congress did not intend the employee to be "affected," that is, injured, in an amount as liquidated damages "equal" to "unpaid" overtime compensation, when the overtime compensation is paid under the circumstances above discussed.

That something is wrong with the theory of automatic violation, and automatic accrual of the liquidated damage liability, for non-payment at a time certain ought to be established if there can be one convincing illustration. It is difficult to conceive that Congress could have intended that the estate of a deceased individual employer would be irrevocably liable to liquidated damages, if he should die before pay day, so that the overtime compensation could not be legally paid without the delay incident to appointment of

administrator and other probate procedure incidental to payment of such claims, notice to creditors, maturity of claim payment time, etc., sometimes running as high as four months, as in Oklahoma.

We do not cite decisions on the point being presented, for the reason that we know of none. In its *Belo, Missel* and *Warren-Bradshaw* opinions, cited under our other propositions, this Court passed upon the liquidated damages being mandatory, not being a penalty, and other related questions. Opinions of lower courts read by us follow those holdings. The decision of the Circuit Court of Appeals in this case is the only decision we know that has passed upon the questions being presented, and it overlooked some of our contentions. If the writ is granted we desire to present the effect of various cases, but believe that the above is sufficient to point out to this Court the unsettled nature of the questions presented. We believe that it will be judicially known that they are causing great confusion among the public, the bar and the courts, and respectfully submit that they should be settled by this Court.

PROPOSITION IV.

(Specification of Error No. 4.)

Liquidated damages under the Fair Labor Standards Act, while not a penalty, being in the nature of a penalty, as designed to compel or inhibit action, were not enforceable during the effectiveness and on account of the *stare decisis* effect of, and against one relying on, the decision of this Court in the case of *Carter* v. *Carter Coal Company*, 298 U. S. 238, which construed the commerce clause of the Constitution of the United States and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and held that under the Constitution the federal government and its Congress are without power to regulate the bituminous coal industry, or wages and hours in that industry.

In our statement in the petition for *certiorari*, we stated

the findings of the lower court that in petitioner's joinder in the belief of both parties that the employment in this case, that of night watchman in a bituminous coal mine, was not subject to the Fair Labor Standards Act, and petitioner's delay in payment of overtime compensation if it was unpaid under the contract as hereinbefore presented, petitioner relied upon advice of counsel and decisions of this Court, including particularly the decision of this Court in *Carter* v. *Carter Coal Company,* 298 U. S. 238.

Petitioner contended in both lower courts, and contends here, that under such circumstances the liquidated damages were not recoverable against petitioner, by reason of the principle of *stare decisis.* The Circuit Court of Appeals denied this contention because the *Carter Coal* case decided the constitutionality of the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, but did not decide the constitutionality of the Fair Labor Standards Act (See opinion, R. 86).

In the case of *James Walter Carter* v. *Carter Coal Company,* 298 U. S. 238, (Sup. Ct.) 80 L. ed. 1160, this Court, in construing the Constitution and legislative power thereunder, as digested in paragraphs 6, 14 and 20 to 23 of the syllabus or headnotes (which we ask leave to use in this brief, in the interest of brevity), held:

> "*6.* The power of Congress to regulate the bituminous coal industry must be found in some specific grant of power and cannot be based upon a supposed general power to protect the general public interest and the health and comfort of the people.
>
> "*14.* The Federal Constitution being the supreme law, the courts must refuse to give effect to a statute which conflicts with the Constitution.
>
> "*20.* That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to Federal regulation under the commerce clause.

"*21.* The power of Congress to regulate interstate commerce does not extend to the establishment of minimum wages, maximum hours of labor, the right of collective bargaining, and conditions of employment in the bituminous coal-mining industry.

"*22.* The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and does not extend to matters the effect of which, whatever its extent, is indirect.

"*23.* The Federal regulatory power in matters relating to interstate commerce ceases when commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins."

In the early case of *William Marbury* v. *James Madison,* 1 Cranch 137, 2 L. ed. 60, this Court, speaking through Chief Justice JOHN MARSHALL, said:

"An Act of Congress repugnant to the Constitution cannot become a law."

In another early decision in the case of *George C. Dodge* v. *John M. Woolsey,* 18 How. 331, 15 L. ed. 401, this Court said:

"The Constitution provides the Supreme Court as a jurisdiction for its final interpretation and for the laws passed by Congress to give them equal operation in all states."

In the case of *Jackson* v. *Harris,* 43 Fed. Rep. (2d) 513, 516 (10th C. C. A.), the Circuit Court of Appeals, while holding that the general principle is that the decision of the highest appellate court of a jurisdiction overruling a former decision is retrospective in its operation and in effect declares that the former decision never was the law, said:

"There is a well settled exception to this general rule that, where contracts have been entered into or rights acquired upon the faith of a decision, they con-

not be impaired by a change of construction made by a subsequent decision. *Moore-Mansfield Co.* v. *Electrical I. Co.*, 234 U. S. 619, 623, 34 S. Ct. 941, 58 L. ed. 1503; *Douglass* v. *County of Pike*, 101 U. S. 677, 687, 25 L. ed. 968; *Green County* v. *Conness*, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872; *New Buffalo* v. *Cambria I. Co.*, 105 U. S. 73, 26 L. ed. 1024; *Nickoll* v. *Racine C. & S. Co.*, 194 Wis. 298, 216 N. W. 502, 504; *Wilkinson* v. *Wallace*, 192 N. C. 156, 134 S. E. 401, 402; *Hoven* v. *McCarthy Bros. Co.*, 163 Minn. 339, 204 N. W. 29; 15 C. J. 960, Sec. 358. See, also, *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451-452, 44 S. Ct. 197, 68 L. ed. 382."

We assume that it is not necessary to make more extensive citation of authorities on the principle of *stare decisis* for the purposes of this petition; and that we may be permitted to do so in briefs, if the writ is granted.

We point out that the *Carter Coal* case did not simply and only construe the Bituminous Coal Conservation Act of 1935, but construed the Constitution of the United States, and the federal and congressional powers thereunder, and lack of powers, as definitely and expressly applicable to the bituminous coal industry, and regulation of wages and hours therein. In our three-departmental form of government, the decisions of this Court are final and binding on citizens, until reversed by this Court. The constitutionality of the Fair Labor Standards Act was not decided by this Court until its decision in the case of *United States* v. *Darby*, 312 U. S. 100, 85 L. ed. 609, rendered February 3, 1941, prior to which all overtime compensation of the respondent in this case had been paid, even though it be held not to have been paid in the monthly salary, except the $19.89 attributable to erroneously deducted lunch time half hours.

The principle of *stare decisis* is a principle which conserves the stability and continuity of government, especially in a three-departmental government. One of those depart-

ments must be supreme and final in its interpretation of the Constitution. Citizenship must obey and respect the binding effect of the decisions of that department, *i. e.*, this Court, until they are reversed, not by Congress or one of the other departments, but by this Court.

We know of no decision except the decision of the courts below in this case that has presented or decided this question of *stare decisis* under the Fair Labor Standards Act. We submit that the opinion of the Circuit Court of Appeals on this point overlooks the fact that the bar contended for was based upon construction by this Court of the Constitution, and its express applicability to facts presented in this case.

It is not contended that *stare decisis* would bar either the minimum wage or overtime compensation, but only the liquidated damages, as legislative impulsion or inhibition in violation of the Constitution as at the time construed by this Court. Such legislative mandate or inhibition, until recognized by this Court, had the effect of requiring citizenship to disregard the Constitution as construed by this Court, and left citizenship without compass or guide in a dilemma in which anarchy would be inherent, without the principle of *stare decisis,* which should be held to bar the liquidated damages under the facts in this case.

Conclusion.

We respectfully submit that the writ of *certiorari* should be granted and that the judgment rendered against petitioner for violation of the Fair Labor Standards Act is unjust and should be reversed.

Respectfully submitted,

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